

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 KUN SHAN PENG, No. C 12-0065 CW (PR)
4 Petitioner,
5 v. ORDER DENYING HABEAS
6 PETITION AND DENYING
CERTIFICATE OF
APPEALABILITY
7 JAMES TILTON, Director, G.
SWARTHOUT, Warden,
8 Respondents.

9 _____ /
10
11 Petitioner, a state prisoner proceeding pro se, has filed
12 this petition for a writ of habeas corpus under 28 U.S.C. § 2254,
13 challenging the 2010 decision by the California Board of Parole
14 Hearings (Board) to deny him parole. He has paid the filing fee.

15 BACKGROUND

16 According to the allegations in the petition, Petitioner
17 plead guilty to second degree murder on August 5, 1992, in Santa
18 Clara County Superior Court. He was sentenced to a term of
19 fifteen years to life in state prison. He did not appeal his
20 conviction or sentence.

21 On July 28, 2010, the Board found Petitioner unsuitable for
22 parole. Petitioner's state habeas corpus petition challenging the
23 Board's decision was denied by the California Supreme Court on
24 December 14, 2011.

25 DISCUSSION

26 A. Standard of Review

27 This Court may entertain a petition for a writ of habeas
28 corpus "in behalf of a person in custody pursuant to the judgment

1 of a State court only on the ground that he is in custody in
2 violation of the Constitution or laws or treaties of the United
3 States." 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21
4 (1975). A district court shall "award the writ or issue an order
5 directing the respondent to show cause why the writ should not be
6 granted, unless it appears from the application that the applicant
7 or person detained is not entitled thereto." 28 U.S.C. § 2243.

8 B. Petitioner's Claims

9 1. Due Process Violation

10 Petitioner claims that the Board's decision finding him
11 unsuitable for parole violated his federal constitutional right to
12 due process because the decision was based solely on the immutable
13 facts of the commitment offense and not on some evidence
14 demonstrating that he poses a current threat to the public.

15 A prisoner subject to California's parole statute receives
16 adequate process when he is allowed an opportunity to be heard and
17 is provided with a statement of the reasons why parole was denied.
18 Swarthout v. Cooke, 131 S. Ct. 859, 862 (2011). The transcript of
19 the parole hearing that Petitioner has attached to his petition
20 shows that he received at least this amount of process. The
21 Constitution does not require more. Id.

22 Further, whether the Board's decision was supported by some
23 evidence of current dangerousness is irrelevant on a petition for
24 a writ of habeas corpus in federal court. The Supreme Court has
25 made clear that "it is no federal concern . . . whether
26 California's 'some evidence' rule of judicial review (a procedure
27 beyond what the Constitution demands) was correctly applied." Id.
28 at 863.

1 Accordingly, Petitioner is not entitled to habeas relief on
2 this claim.

3 2. Ex Post Facto Violation

4 Petitioner claims the denial of parole violated his federal
5 constitutional right to be free from the ex post facto application
6 of punitive laws because he committed his crime in 1988 but was
7 denied parole based on laws enacted in 1988 and 2008.

8 Proposition 89 was enacted in 1988. It gave the governor
9 power to review and reverse or modify the Board's parole
10 decisions. The Ninth Circuit has found, as a matter of law, that
11 Proposition 89 does not raise ex post facto concerns because a
12 prisoner cannot demonstrate with certainty that he would have been
13 granted parole before the change. See Johnson v. Gomez, 92 F.3d
14 964, 967-68 (9th Cir. 1996).

15 Proposition 9 (also known as the "Victims' Bill of Rights Act
16 of 2008: Marsy's Law") was enacted in 2008. It modified the
17 availability and frequency of parole hearings. See Cal. Penal
18 Code § 3041.5(b)(3) (2010). The United States Supreme Court found
19 the law did not raise ex post facto concerns because it had "no
20 effect on the standards for fixing a prisoner's initial date of
21 'eligibility' for parole" or for "determining his 'suitability'
22 for parole" and setting his release date; rather, the focus of the
23 law was to relieve the parole board from the costly and time-
24 consuming responsibility of scheduling parole hearings for
25 prisoners who have no reasonable chance of being released. See
26 California Dep't of Corrections v. Morales, 514 U.S. 499, 507
27 (1995).

1 Accordingly, Petitioner is not entitled to habeas relief on
2 this claim.

3 3. Breach of Plea Agreement

4 Petitioner claims that the Board's denial of parole is a
5 breach of the term of his plea agreement that he would receive a
6 sentence of fifteen years to life in exchange for pleading guilty
7 to second-degree murder.

8 "Plea agreements are contractual in nature and are measured
9 by contract law standards." Brown v. Poole, 337 F.3d 1155, 1159
10 (9th Cir. 2003) (quoting United States v. De la Fuente, 8 F.3d
11 1333, 1337 (9th Cir. 1993)). Although a criminal defendant has a
12 due process right to enforce the terms of a plea agreement, see
13 Santobello v. New York, 404 U.S. 257, 261-62 (1971), Petitioner
14 has alleged no facts indicating that there is a term of the plea
15 agreement that has been breached.

16 Petitioner first contends the plea agreement has been
17 breached because he is being punished as if he had plead guilty to
18 first-degree murder. Specifically, he maintains that the maximum
19 sentence he could have received for second-degree murder is
20 twenty-one years, but by the time he was denied parole in 2010 he
21 had served twenty-four years. This argument fails because
22 Petitioner is receiving parole consideration based on his sentence
23 of fifteen years to life. First-degree murder is punishable by
24 death, life without parole, or a term of twenty-five years to
25 life. Cal. Penal Code § 190(a). Consequently, if Petitioner had
26 been convicted of first-degree murder, he would not have been
27 eligible for parole consideration in 2010.

28 Petitioner also appears to argue that under the plea

United States District Court
For the Northern District of California

1 agreement he should have been released after he reached the
2 minimum term of years on his sentence. This claim fails, however,
3 because he does not allege that the plea agreement included a
4 promise that he would be released on parole after he reached any
5 specific number of years in custody.

6 Moreover, the claim is belied by the transcript of the change
7 of plea hearing, the abstract of judgment and the sentencing
8 report.¹ Specifically, during the plea colloquy, the trial judge
9 asked Petitioner if he understood that he was pleading guilty to a
10 charge of second-degree murder, "with the understanding that
11 you'll be sentenced to prison for fifteen years to life." Peng v.
12 Tilton, C 07-4797 MMC (PR), Docket no. 13, Ex. 1 at 3:6-11.
13 Petitioner responded that he did. Id. at 3:12. Thereafter,
14 Petitioner's counsel, Mr. Mayfield, stated for the record that he
15 had explained to Petitioner that he was pleading guilty to a
16 sentence of fifteen years to life, he would not be eligible for
17 parole consideration until he had served ten years of his
18 sentence, and he "most likely" would not be granted parole the
19 first time he came before the parole board but "he then would be
20 considered again and his chances would improve." Id. at 10:3-24.
21 Additionally, the following conversation took place between the
22 Mr. Schon (the prosecutor), Petitioner and Mr. Mayfield:

23 Mr. Schon: I think it should be pointed out to Mr.
24 Peng, that the parole board looks at how you behave in
prison to decide when to parole you. There's a

25

¹ The Court takes judicial notice of these documents, which
26 were filed as exhibits in support of Respondent's motion to
dismiss as untimely Petitioner's federal habeas corpus petition
27 challenging his conviction. See Peng v. Tilton, C 07-4797 MMC
28 (PR), Docket no. 13.

1 possibility you could serve fifteen years or more than
2 fifteen years all the way up to life if the parole board
3 feels that for some reason you should be kept in prison.
4 That's important for you to realize so it's important
5 for you in prison to be well behaved and to follow their
6 instructions, to make yourself a more suitable candidate
7 for parole, whenever they start considering you for
8 parole, okay Mr. Peng?

9
10 Petitioner: Oh, yeah.

11 Mr. Schon: Do you understand that, Mr. Peng?

12 Petitioner: Yes.

13 Mr. Mayfield: Then Mr. Peng I explained that to you as
14 well didn't I?

15 Petitioner: Yes.

16 Ex. 1 at 11:27-12:14.

17 Based on the above, the Court finds no merit to Petitioner's
18 claim that his plea agreement was breached because he was denied
19 parole. Accordingly, he is not entitled to habeas relief on this
20 claim.

21 D. Eighth Amendment Violation

22 Petitioner contends that by denying him parole the Board has
23 subjected him to cruel and unusual punishment in violation of the
24 Eighth Amendment.

25 The argument is without merit. The Eighth Amendment
26 forbids only extreme sentences that are "grossly disproportionate
27 to the crime." Ewing v. California, 538 U.S. 11, 23 (2003). Even
28 if the Court assumes, for the sake of argument, that Petitioner
will serve the maximum term of life, a life sentence for the crime
of murder is not disproportionate to the crime committed. Cf.
Ewing v. California, 538 U.S. 11 (2003) (finding Eighth Amendment
not violated by sentence of twenty-five years to life for grand
theft); Harmelin v. Michigan, 501 U.S. 957 (1991) (finding Eighth

1 Amendment not violated by life sentence for cocaine possession);
2 Hutto v. Davis, 454 U.S. 370 (1982) (finding Eighth Amendment not
3 violated by forty-year sentence and \$20,000 fine for possession
4 and distribution of nine ounces of marijuana).

5 Accordingly, Petitioner is not entitled to habeas relief on
6 this claim.

7 CONCLUSION

8 For the foregoing reasons, the Court orders as follows:

- 9 1. The petition for a writ of habeas corpus is DENIED.
10 2. A Certificate of Appealability (COA) is DENIED.

11 Petitioner has not made "a substantial showing of the denial
12 of a constitutional right," 28 U.S.C. § 2253(c)(2), or
13 demonstrated that "reasonable jurists would find the district
14 court's assessment of the constitutional claims debatable or
15 wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). The denial
16 of a COA cannot be appealed; however, Petitioner may seek a COA
17 directly from the Ninth Circuit under Rule 22 of the Federal Rules
18 of Appellate Procedure. See Rule 11(a) of the Rules Governing
19 Section 2254 Cases.

20 The Clerk of the Court shall enter judgment and close the
21 file.

22 IT IS SO ORDERED.

23
24 Dated: 10/29/2012


25 CLAUDIA WILKEN
26 United States District Judge
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